



**MASTER AGREEMENT**

entered into by and between

**TRANSNET SOC LTD**

and

.....

**ESTABLISHMENT OF AN APPROVED PANEL OF SERVICE PROVIDERS TO BE APPOINTED AS OPERATOR(S) OF LAST RESORT OF TNPA PORT TERMINAL/FACILITY OPERATIONS, FOR A PERIOD OF THREE (3) YEARS FOR AS AND WHEN REQUIRED, AS A TRANSITIONAL MECHANISM UNTIL NEW TERMINAL OPERATOR(S) ARE APPOINTED THROUGH THE SECTION 56 PROCESS.**

**Agreement Number**                    .....

**Commencement Date**                .....

**Expiry Date**                            .....

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SCHEDULE 1 – SCHEDULE OF REQUIREMENTS

**1 INTRODUCTION**

This Agreement is entered into by and between:

**Transnet SOC Ltd** [Registration Number 1990/000900/30] whose registered address is eMendi Building, N2 Neptune Road, Off Klub Road, Port of Ngqura, Port Elizabeth, 6100, Republic of South Africa  
[Transnet]

and

..... [Registration Number .....] whose registered address is  
..... [the Terminal Operator].

**NOW THEREFORE, IT IS AGREED:**

- 1.1 Transnet hereby appoints the Terminal Operator to provide, and Transnet undertakes to accept the provision of Services provided for herein, as formally agreed between the Parties and in accordance with the Schedule of Requirements issued as a schedule to this Agreement; and
- 1.2 the Terminal Operator hereby undertakes to provide the Services provided for herein, as formally agreed between the Parties and in accordance with the Schedule of Requirements issued as a schedule to this Agreement.

**2 DEFINITIONS**

Where the following words or phrases are used in this Agreement, such words or phrases shall have the meaning assigned thereto in this clause, except where the context clearly requires otherwise:

- 2.1 **AFSA** means the Arbitration Foundation of South Africa;
- 2.2 **Agreement** means this Agreement and its associated schedules and/or annexures and/or appendices, and/or schedules, including the Schedule of Requirements/Work Orders, the technical specifications for the Services and such special conditions as shall apply to this Agreement, together with the General Tender Conditions and any additional provisions in the associated bid documents tendered by the Terminal Operator [as agreed, in writing, between the Parties], which collectively and exclusively govern the provision of Services and provision of ancillary Services by the Terminal Operator to Transnet;
- 2.3 **Assignment** refers to the transfer of rights and obligations in a contract from an assigner to an assignee.
- 2.4 **Background Intellectual Property** means all Intellectual Property introduced and required by either Party to give effect to their obligations under this Agreement owned in whole or in part by or licensed to either Party or their affiliates prior to the Commencement Date or developed after the Commencement Date otherwise pursuant to this Agreement;
- 2.5 **Business Day(s)** means Mondays to Fridays between 08:00 and 16:00, excluding public holidays as proclaimed in South Africa;
- 2.6 **Cession** refers to the transfer of the rights and obligations which the the Terminal Operator has in terms of a contract from it to a third party.
- 2.7 **Commencement Date** means ....., notwithstanding the signature date of this Agreement;

- 2.8 **Confidential Information** means any information or other data, whether in written, oral, graphic or in any other form such as in documents, papers, memoranda, correspondence, notebooks, reports, drawings, diagrams, discs, articles, samples, test results, prototypes, designs, plans, formulae, patents, or inventor's certificates, which a Party discloses or provides to the other Party [intentionally or unintentionally, or as a result of one Party permitting the representative of the other Party to visit any of its premises], or which otherwise becomes known to a Party, and which is not in the public domain and includes, without limiting the generality of the term:
- a) information relating to methods of operation, data and plans of the disclosing Party;
  - b) the contents of this Agreement;
  - c) private and personal details of employees or clients of the disclosing Party or any other person where an onus rests on the disclosing Party to maintain the confidentiality of such information;
  - d) any information disclosed by either Party and which is clearly marked as being confidential or secret;
  - e) information relating to the strategic objectives and planning of the disclosing Party relating to its existing and planned future business activities;
  - f) information relating to the past, present and future research and development of the disclosing Party;
  - g) information relating to the business activities, business relationships, products, services, customers, clients and Subcontractors of the disclosing Party where an onus rests on the disclosing Party to maintain the confidentiality of such information;
  - h) information contained in the software and associated material and documentation belonging to the disclosing Party;
  - i) technical and scientific information, Know-How and trade secrets of a disclosing Party including inventions, applications and processes;
  - j) Copyright works;
  - k) commercial, financial and marketing information;
  - l) data concerning architecture, demonstrations, tools and techniques, processes, machinery and equipment of the disclosing Party;
  - m) plans, designs, concepts, drawings, functional and technical requirements and specifications of the disclosing Party;
  - n) information concerning faults or defects in Goods, equipment, hardware or software or the incidence of such faults or defects; and
  - o) information concerning the charges, fees and/or costs of the disclosing Party or its authorised Subcontractors, or their methods, practices or service performance levels actually achieved;
- 2.9 **Copyright** means the right in expressions, procedures, methods of operations or mathematical concepts, computer program codes, compilations of data or other material, literary works, musical works, artistic works, sound recordings, broadcasts, program carrying signals, published editions, photographic works, or cinematographic works of the copyright owner to do or to authorise the doing of certain acts specified in respect of the different categories of works;

- 2.10 **Data** means all data, databases, documents, information, graphics, text or other material in an electronic or tangible medium which the Parties to this Agreement generate, collect, process, store or transmit in relation to their business;
- 2.11 **Designs** mean registered Designs and/or Design applications and will include the monopoly right granted for the protection of an independently created industrial design including designs dictated essentially by technical or functional considerations as well as topographies of integrated circuits and integrated circuits;
- 2.12 **Expiry Date** means ..... ;
- 2.13 **Foreground Intellectual Property** means all Intellectual Property developed by either Party pursuant to this Agreement;
- 2.14 **Intellectual Property** means Patents, Designs, Know-How, Copyright and Trade Marks and all rights having equivalent or similar effect which may exist anywhere in the world and includes all future additions and improvements to the Intellectual Property;
- 2.15 **Know-How** means all Confidential Information of whatever nature relating to the Intellectual Property and its exploitation as well as all other Confidential Information generally relating to Transnet's field of technology, including technical information, processing or manufacturing techniques, Designs, specifications, formulae, systems, processes, information concerning materials and marketing and business information in general;
- 2.16 **Parties** mean the Parties to this Agreement together with their subsidiaries, divisions, business units, successors-in-title and assigns;
- 2.17 **Party** means either one of these Parties;
- 2.18 **Patents** mean registered Patents and Patent applications, once the latter have proceeded to grant, and includes a right granted for any inventions, products or processes in all fields of technology;
- 2.19 **Permitted Purpose** means any activity or process to be undertaken or supervised by a Staff member of one Party during the term of this Agreement, for which purpose authorised disclosure of the other Party's Confidential Information or Intellectual Property is a prerequisite in order to enable such activity or process to be accomplished;
- 2.20 **Price(s)** means the agreed Price(s) for the Services to be purchased from the Terminal Operator by Transnet, as detailed in the Schedule of Requirements, issued in accordance with this Agreement, as amended by mutual agreement between the Parties and in accordance with the terms and conditions in this Agreement from time to time;
- 2.21 **Purchase Order(s)** means official orders issued by an operating division of Transnet to the Terminal Operator for the supply of Goods or Services;
- 2.22 **Service(s)** means the Operator(s) of Last Resort of TNPA Port Terminal/Facility Operations as a Transitional Mechanism Until New Terminal Operator(s) are Appointed Through the Section 56 Process, the Service(s) provided to Transnet by the Terminal Operator, pursuant to the Work Order(s) in terms of this Agreement;
- 2.23 **Service Level Agreement** or **SLA** means the processes, deliverables, key performance indicators and performance standards relating to the Services to be provided by the Terminal Operator;
- 2.24 **Terminal Operator Materials** means all works of authorship, products and materials [including, but not limited to, data, diagrams, charts, reports, specifications, studies, inventions, software, software development tools, methodologies, ideas, methods, processes, concepts and techniques]

owned by, or licensed to, the Terminal Operator prior to the Commencement Date or independently developed by the Terminal Operator outside the scope of this Agreement at no expense to Transnet, and used by the Terminal Operator in the performance of the Services;

- 2.25 **Staff** means any partner, employee, agent, consultant, independent associate or contractor, Subcontractor and the staff of such Subcontractor, or other authorised representative of either Party;
- 2.26 **Schedule of Requirements** means Schedule 1 hereto;
- 2.27 **Subcontract** means any contract or agreement or proposed contract or agreement between the Terminal Operator and any third party whereby that third party agrees to provide to the Terminal Operator the Goods or related Services or any part thereof or material used in the manufacture of the Goods or any part thereof;
- 2.28 **Subcontractor** means the third party with whom the Terminal Operator enters into a Subcontract;
- 2.29 **Tax Invoice** means the document as required by Section 20 of the VAT Act, as may be amended from time to time;
- 2.30 **Trade Marks** mean registered Trade Marks and Trade Mark applications and include any sign or logo, or combination of signs and/or logos capable of distinguishing the goods or services of one undertaking from those of another undertaking;
- 2.31 **VAT** means Value-Added Tax chargeable in terms of the VAT Act, 89 of 1991, as may be amended from time to time; and
- 2.32 **VAT Act** means the Value Added Tax Act, No 89 of 1991, as may be amended from time to time.
- 2.33 **Work Order(s)** means a detailed scope of work for a Service required by Transnet, including **timeframes**, Deliverable, Fees and costs for the supply of the Service to Transnet, which may be appended to this Agreement from time to time.

### 3 INTERPRETATION

- 3.1 Clause headings in this Agreement are included for ease of reference only and do not form part of this Agreement for the purposes of interpretation or for any other purpose. No provision shall be construed against or interpreted to the disadvantage of either Party hereto by reason of such Party having or being deemed to have structured or drafted such provision.
- 3.2 Any term, word or phrase used in this Agreement, other than those defined under the clause heading "*Definitions*" shall be given its plain English meaning, and those terms, words, acronyms, and phrases used in this Agreement will be interpreted in accordance with the generally accepted meanings accorded thereto.
- 3.3 A reference to the singular incorporates a reference to the plural and *vice versa*.
- 3.4 A reference to natural persons incorporates a reference to legal persons and *vice versa*.
- 3.5 A reference to a particular gender incorporates a reference to the other gender.

### 4 NATURE AND SCOPE

- 4.1 The Terminal Operator, once appointed to the approved list of Terminal Operators, will be invited to compete for the appointment, as and when the need arises for the TNPA to make such an appointment by way of a Request for Quotation. The Terminal Operator acknowledges that the

conclusion of this agreement will not automatically entitle it to such an appointment and TNPA is, for the avoidance of doubt not obliged to make such appointment.

- 4.2 This Agreement is an agreement under the terms and conditions of which the Terminal Operator will arrange for the provision to Transnet of the Services which meet the requirements and specifications of Transnet, the delivery of which is controlled by means of Purchase Orders to be issued by Transnet and executed by the Terminal Operator in accordance with this Agreement.
- 4.3 Such Purchase Orders and deliveries to Transnet shall be agreed between the Parties from time to time, subject to the terms of the Schedule of Requirements.
- 4.4 Each properly executed Purchase Order forms an inseparable part of this Agreement as if it were fully incorporated into the body of this Agreement.
- 4.5 During the period of this Agreement, both Parties can make written suggestions for amendments to the Schedule of Requirements in accordance with procedures set out in clause 38 [*Amendment and Change Control*]. A Party will advise the other Party within 14 [fourteen] Business Days, or such other period as mutually agreed, whether the amendment is acceptable.
- 4.6 Insofar as any term, provision or condition in the Schedule of Requirements conflicts with a like term, provision or condition in this Agreement and/or a Purchase Order, the term or provision or condition in this Master Agreement shall prevail, unless such term or provision or condition in this Master Agreement has been specifically revoked or amended by mutual written agreement between the Parties.
- 4.7 Time will be of the essence and the Terminal Operator will perform its obligations under this Agreement in accordance with the timeframe(s) [if any] set out in the relevant schedule, save that the Terminal Operator will not be liable under this clause if it is unable to meet such obligation within the time required as a direct result of any act or omission by Transnet and it has used its best endeavours to advise Transnet of such act or omission. In the event of such delay, any time deadlines detailed in the relevant schedule shall be extended by a period equal to the period of that delay.

## **5 AUTHORITY OF PARTIES**

- 5.1 Nothing in this Agreement will constitute or be deemed to constitute a partnership between the Parties or constitute or be deemed to constitute the Parties as agents or employees of one another for any purpose or in any form whatsoever.
- 5.2 Neither Party shall be entitled to, or have the power or authority to:
  - a) enter into an agreement in the name of the other; or
  - b) give any warranty, representation or undertaking on the other's behalf; or
  - c) create any liability against the other or bind the other's credit in any way or for any purpose whatsoever.

## **6 DURATION/TERM AND CANCELLATION**

- 6.1 Notwithstanding the date of signature hereof, the Commencement Date if this Agreement is ..... and the duration shall be for a three [3] years period, expiring on ....., unless:
  - a) this Agreement is terminated by either Party in accordance with the provisions incorporated herein or in any schedules or annexures appended hereto, or otherwise in accordance with law or equity; or

- 6.2 Notwithstanding clause 266 [*Breach and Termination*], either Party may cancel this Agreement without cause by giving 30 [thirty] calendar days prior written notice thereof to the other Party, provided that in such instance, this Agreement will nevertheless be applicable in respect of all Purchase Orders which have been placed prior to the date of such cancellation.

## **7 RISK MANAGEMENT**

- 7.1 Where Transnet determines appropriate, within 2 (Two) weeks from the date of contract signature, the Parties are to meet to prepare and maintain a contract Risk Register. The Risk Register shall include a description of the risks and a description of the actions which are to be taken to avoid or reduce these risks which both Parties shall jointly determine.
- 7.2 Contract progress meetings shall be held monthly, or unless otherwise agreed between the Parties in writing. The purposes of these progress meetings shall be to capture the number of late deliverables against agreed milestones, actual costs against payment plans, performance issues or concerns, contract requirements not achieved, the status of previous corrective actions and risk management. Minutes of meetings shall be maintained and signed off between the Parties throughout the contract period.

## **8 TRANSNET'S OBLIGATIONS**

- 8.1 Transnet undertakes to promptly comply with any reasonable request by the Terminal Operator for information, including information concerning Transnet's operations and activities, that relates to the Services as may be necessary for the Terminal Operator to provide the Services, but for no other purpose. However, Transnet's compliance with any request for information is subject to any internal security rules and requirements and subject to the observance by the Terminal Operator of its confidentiality obligations under this Agreement.
- 8.2 The Terminal Operator shall give Transnet reasonable notice of any information it requires.
- 8.3 Transnet agrees to provide the Terminal Operator or its Personnel such access to and use of its facilities as is necessary to allow the Terminal Operator to perform its obligations under this Agreement.
- 8.4 Transnet shall cooperate, in good faith, with the Terminal Operator in all matters relating to Terminal Operator's performance of the Services, and provide the Services provide with accurate information and resource as is necessary for the Terminal Operator to provide the Services and in a timely manner.
- 8.5 Transnet shall comply with all applicable laws, including, without limitation its requirements under the Protection of Personal Information Act, 2013, as amended.

## **9 GENERAL OBLIGATIONS OF THE TERMINAL OPERATOR**

- 9.1 General Rights and Obligations of the Terminal Operator ;
- 9.1.1 Use of Terminal, No Alienation or Encumbrance and Site Condition
- 9.1.2 The Terminal shall be used solely for the purpose of providing Services and carrying out tasks and activities that are reasonably necessary for and incidental to the provision of those Services, in accordance with this Agreement (including the terms, conditions, exclusions, limitations and restrictions contained in Schedule 4 (Scope of Services)), and for the exercise by the Terminal Operator of its rights and the fulfilment of its obligations



- under this Agreement, and for no other purpose whatsoever, unless the prior written consent of TNPA has been obtained which consent may not be unreasonably withheld.
- 9.1.3 The Terminal Operator shall not lease, sell, dispose of or otherwise alienate or encumber the whole or any portion of the Project Site or the Terminal (except the Terminal Equipment) in any manner whatsoever.
- 9.1.4 The Terminal Operator shall not use the Terminal for residential purposes or as sleeping quarters, except if the Terminal Operator elects to provide accommodation facilities as part of the Authorised Services or if TNPA authorises (in writing) the use of a portion of the Terminal as sleeping quarters for operational or security purposes.
- 9.1.5 The Terminal Operator shall not do or cause anything to be done that may cause a nuisance to TNPA or to any other Port User or the occupants of adjoining properties.
- 9.1.6 The Terminal Operator shall not do anything that materially detracts from the appearance or safe Operation and Maintenance of the Terminal, the Terminal Infrastructure or the Terminal Equipment.
- 9.1.7 The Terminal Operator acknowledges and agrees that the Terminal Operator has inspected the Project Site and has satisfied itself fully as to the location, condition, geotechnical characteristics and features, zoning, ownership, existing Encumbrances, nature and extent of the Project Site as well as any and all Consents already granted to or held by TNPA in respect of the Project Site and the Terminal Operator expressly records and agrees that TNPA does not warrant the suitability or otherwise of the Project Site, buildings, infrastructure and improvements thereon for purposes of undertaking the Construction, Operation and/or Maintenance of the Terminal or for purposes of providing the Services and that the Terminal Operator shall have no claims whatsoever against TNPA in respect of the location, condition, geotechnical characteristics and features, zoning, ownership, existing Encumbrances, defects, nature and extent of the Project Site, buildings, infrastructure and improvements thereon as well as any and all Consents already granted to or held by TNPA in respect of the Project Site.
- 9.2 Terminal Operator's Obligations to provide the Services, shall on appointment, as contemplated in clause 4.1 above, include inter alia the following :
- 9.2.1 The Terminal Operator shall provide the Services in accordance with the terms of this Agreement for the duration of the Operations Period.
- 9.2.2 The Terminal Operator shall in providing the Services, comply at all times with, the Operational Plan and the Terminal Operator Performance Standards and the provisions of this Agreement.
- 9.2.3 The Terminal Operator shall provide the services of the terminal 365 (three hundred and sixty five) days of the year on a 24/7 basis for the duration of the operations period save for Christmas day and New Year's Day.
- 9.2.4 The Terminal shall be used, managed and operated on a common-user basis, meaning that the Terminal Operator shall provide reasonable equality of access to the Terminal to Terminal users and potential Terminal users wishing to utilise the Services of the Terminal

subject to capacity availability and shall not unreasonably discriminate, in its tariff structure or in its trading conditions, between various users or potential users of the Terminal.

9.2.5 The Terminal Operator shall provide the Services with effect from the Operations Commencement Date.

9.2.6 The Terminal Operator shall provide the Services at any time during the Operations Period, or earlier if so elected by the Terminal Operator. The Terminal Operator shall be entitled to provide one or more of the Service/s at any time during the Operations Period either on a temporary basis or permanent basis should a commercial opportunity arise.

9.2.7 Without limiting the obligations of the Terminal Operator as specified in this Agreement or imposed by Law, the Terminal Operator shall, subject to available capacity:

9.2.7.1 provide reliable, secure and efficient Services to all Port Users wishing to use any or all of the Services;

9.2.7.2 ensure that the provision of any Services as envisaged above, does not hinder or otherwise unreasonably interfere with any other activities or Services undertaken or conducted at the Port of Durban by TNPA, any other Port User or any other Person;

9.2.7.3 obtain, maintain and renew all documents and all Consents necessary to Operate and Maintain the Terminal and to render the Services and perform the activities and discharge the obligations contained in clause 9.1 (General Rights and Obligations of the Terminal Operator) and this clause 9.2 (Terminal Operator's Obligations to provide the Services) and in this Agreement;

9.2.7.4 ensure that if any Contractors, Subcontractors, agents and service providers used by it require a licence in terms of the Act, such persons are duly licensed;

9.2.7.5 provide, maintain or replace, according to International Best Practice, all operating and other equipment necessary for the efficient operation of the Terminal; and

9.2.7.6 promote and foster positive customer relations and actively market and promote the Terminal and the Services to potential customers and Port Users.

### 9.3 Terminal Operator's Replacement, Repair, Operation and Maintenance Obligations

9.3.1 The Terminal, the Terminal Infrastructure, the Terminal Equipment, the Project Site, and any other equipment that is necessary for the safe and efficient Operation and Maintenance of the Terminal shall be Operated and Maintained by the Terminal Operator at its own cost, and kept in good working order and condition and in a safe operating condition and in accordance with the Operational Plan and the Terminal Operator Performance Standards and International Best Practice as well as all applicable Laws, any applicable national standards, specifications and codes of practice which are generally applied in South Africa in relation to such Operation and Maintenance.

9.3.2 The Terminal Operator shall be responsible for repairs, renewals and replacement of the Terminal Infrastructure and the Terminal Equipment as is necessary for the continued and efficient operation of the Terminal.

9.3.3 The Terminal Operator shall procure, install, commission, test, Operate and Maintain appropriate communications, safety, control and administrative systems and equipment as are necessary for the safe and proper use, Operation and Maintenance of the Terminal in

accordance with the Detailed Design, the Operational Plan, and the Terminal Operator Performance Standards, the IPMS and International Best Practice.

- 9.3.4 The Terminal Operator shall keep the Terminal and the Project Site as well as those portions utilised by the Terminal Operator for their operations, in a clean, orderly and sanitary condition.
- 9.3.5 The Terminal Operator shall attend to removal of intrusive vegetation including regular control and removal of grass, noxious and other weeds, and other plants and vegetation on the Project Site (save for any landscaped gardens which may be provided for in the Detailed Design).
- 9.3.6 The Terminal Operator shall, in the Operation and Maintenance of the Terminal, comply with all other applicable Laws (including all labour related Laws) the Port Rules, the Port Regulations, TNPA Policies, any directives issued in terms of the Act, and generally perform the Services, conduct its activities and operations at the Terminal in accordance with all applicable Laws.
- 9.3.7 The Terminal Operator shall conduct annual inspections of the Terminal Infrastructure and Terminal Equipment and must incorporate the outcome of each such annual inspection in the Annual Report as provided for in Reporting Requirements. The Terminal Operator shall provide TNPA with a maintenance programme for the Terminal Infrastructure and a maintenance and replacement programme for the Terminal Equipment, in accordance with the Reporting Requirements.

## **10 TERMINAL OPERATOR'S PERSONNEL**

- 10.1 The Terminal Operator's Personnel shall be regarded at all times as employees, agents or Subcontractors of the Terminal Operator and no relationship of employer and employee shall arise between Transnet and any Terminal Operator Personnel under any circumstances regardless of the degree of supervision that may be exercised over the Personnel by Transnet.
- 10.2 The Terminal Operator warrants that all its Personnel will be entitled to work in South Africa or any other country in which the Services are to be performed.
- 10.3 The Terminal Operator will ensure that its Personnel comply with all reasonable requirements made known to the Terminal Operator by Transnet concerning conduct at any Transnet premises or any other premises upon which the Services are to be performed [including but not limited to security regulations, policy standards and codes of practice and health and safety requirements]. The Terminal Operator will ensure that such Personnel at all times act in a lawful and proper manner in accordance with these requirements.
- 10.4 Transnet reserves the right to refuse to admit or to remove from any premises occupied by or on behalf of it, any Terminal Operator Personnel whose admission or presence would, in the reasonable opinion of Transnet, be undesirable or who represents a threat to confidentiality or security or whose presence would be in breach of any rules and regulations governing Transnet's Personnel, provided that Transnet notifies the Terminal Operator of any such refusal [with reasons why]. The reasonable exclusion of any such individual from such premises shall not relieve the Terminal Operator from the performance of its obligations under this Agreement.
- 10.5 The Terminal Operator agrees to use all reasonable endeavours to ensure the continuity of its Personnel assigned to perform the Services. If any re-assignment by the Terminal Operator of those

Personnel is necessary, or if Transnet advises that any such Personnel assigned are in any respect unsatisfactory, including where any such Personnel are, or are expected to be or have been absent for any period, then the Terminal Operator will promptly supply a replacement of equivalent calibre and experience, and any such replacement shall be approved by Transnet prior to commencing provision of the Services, such approval not to be unreasonably withheld or delayed.

## **11 SUBCONTRACTING**

- 11.1 Regardless of the fact that this Agreement permits or requires the Terminal Operator to appoint third parties to perform part of the Project, such appointment shall not relieve or excuse the Terminal Operator of any duty, obligation, liability or responsibility under this Agreement and in respect of the Project.
- 11.2 The Terminal Operator shall be responsible for the management and supervision of any third parties appointed by it to perform any part of the Project. The Terminal Operator shall be and shall remain, at all times, fully responsible and liable for the actions and omissions (whether negligent, wilful or intentional) of all such third parties and of the agents, representatives and employees of such third parties, whether such third parties are employed directly or indirectly by the Terminal Operator.
- 11.3 Nothing in this Agreement is intended to create or should be interpreted as creating any privity of contract between TNPA and any third parties appointed by the Terminal Operator to perform any part of the Project. The Terminal Operator shall ensure that a provision to this effect is inserted into every contract entered into by it with such a third party.

## **12 MARINE SERVICES AND BERTHING**

- 12.1 The berthing of vessels and the allocation of Marine Services thereto shall be assigned by the Harbour Master in accordance with and subject to the following:
- 12.1.1 The Terminal Operator shall apply for the allocation of Marine Services for the berthing and/or movement of vessels by requesting such Marine Services on the IPMS booking system, in terms of which, inter alia, the Terminal Operator or its agent shall be required to specify the estimated time of arrival and/or departure of such vessel.
- 12.1.2 Such request shall be confirmed or declined by the Harbour Master, and, if confirmed, shall be subject to reconfirmation by the Harbour Master at various time periods prior to arrival of the vessel.
- 12.2 The allocation of Marine Services in relation to the berthing of vessels shall be determined in the absolute discretion of the Harbour Master but subject to the following principles:
- 12.2.1 Marine Services shall be allocated in accordance with the provisions of the Port's Marine Resource Allocation Policy and as agreed at port berth planning meetings;
- 12.2.2 notwithstanding the allocation of Marine Services, the Harbour Master shall be entitled, at any time, acting in accordance with, and in furtherance of, the powers and functions assigned to the Harbour Master in terms of the Ports Act and/or the Port Rules, to:
- i) assign a vessel to any berth; and/or
  - ii) direct that a vessel be shifted from any berth,

in order to give precedence to the interests of safety, security, good order, the efficient working of the Port and the protection of the environment.

- 12.3 As far as practically possible, but subject to the constraints referred to in clause 12.2, the Harbour Master shall accommodate the booking requests and preferences of the Terminal Operator in respect of the berthing of vessels and the assignment and/or allocation of Marine Services thereto and, if requested, give consideration to the contractual and other requirements of the Terminal Operator in making such assignment and/or allocation.

### **13 THE AUTHORITY'S REPAIR AND MAINTENANCE OBLIGATIONS**

- 13.1 The Authority shall have no responsibility to perform any repair or maintenance work in respect of the Terminal, which includes the Terminal Infrastructure, other than:
- 13.1.1 maintenance dredging at the Berth;
  - 13.1.2 repair and maintenance of the network for the provision of water, lights, power, sewerage and/or similar services outside of Terminal boundaries but within the port boundaries ("the network"); and
  - 13.1.3 repair and maintenance of berth structures up to the cope line, including the quay walls, and their foundations, cathodic protection, fenders and their fastenings, access points to the service tunnel(s), and the repair and maintenance or replacement of quay furniture (including bollards, storm bollards and step ladders),
  - 13.1.4 unless the network or the berth structures, equipment or quay furniture are damaged or require repair arising from any negligent or wilful act or omission of the Terminal Operator, its employees, subcontractors or agents, in which case the Authority shall make the necessary repairs and be entitled to recover the costs from the Terminal Operator, who shall be obliged to reimburse the Authority for such costs on demand.
- 13.2 The Terminal Operator shall be responsible for maintaining the Terminal Infrastructure and Equipment and shall at its own cost undertake all maintenance and make all repairs and replacements necessary to maintain the Terminal and for the efficient operation of the Terminal, as follows:
- 13.2.1 The Terminal Infrastructure (including the surface of the quay) shall be maintained and kept in good order and condition, in accordance with Good Industry Practice and the international standards for a Terminal.
  - 13.2.2 The Terminal Operator shall provide equipment in order to ensure the efficient operation of the Terminal in accordance with Good Industry Practice and the international standards for a terminal comparable to the Terminal.

### **14 THE TERMINAL OPERATOR'S TARIFFS**

The Terminal Operator shall be entitled to levy such charges as may be deemed necessary and appropriate for the provision of the services, provided that it shall not engage in anti-competitive behaviour and levy charges, which would limit and restrict any port user's access to the services provided by the Terminal Operator.

### **15 PAYMENT TO SUB-CONTRACTORS**

- 15.1 Transnet reserves the right, in its sole discretion, to make payment directly to the sub-contractor of the Terminal Operator, subject to the following conditions:

- a) Receipt of an undisputed invoice from the sub-contractor; and
  - b) Receipt of written confirmation from the Terminal Operator that the amounts claimed by the sub-contractor are correct and that the services for which the sub-contractor has requested payment were rendered to the satisfaction of the Terminal Operator, against the required standards.
- 15.2 Nothing contained in this clause must be interpreted as bestowing on any sub-contractor a right or legitimate expectation to be paid directly by Transnet. Furthermore, this clause does not bestow any right or legitimate expectation on the Terminal Operator to demand that Transnet pay its sub-contractor directly. The decision to pay any sub-contractor directly, remains that of Transnet alone.
- 15.3 The Terminal Operator remains liable for its contractual obligations under the Agreement, including all services rendered by the sub-contractor.
- 15.4 This clause does not establish any contractual relationship between Transnet and any sub-contractor of the Terminal Operator, whatsoever.

## **16 B-BBEE AND SOCIO-ECONOMIC OBLIGATIONS**

### **16.1 B-BBEE Scorecard**

- a) Transnet fully endorses and supports the Broad-Based Black Economic Empowerment Programme and is strongly of the opinion that all South African business enterprises have an equal obligation to redress the imbalances of the past.
- b) In response to this requirement, the Terminal Operator shall submit to Transnet's Contract Manager or such other designated person details of its B-BBEE status in terms of the latest Codes of Good Practice issued in terms of the B-BBEE Act and proof thereof at the beginning of March each year during the currency of this Agreement.
- c) The Terminal Operator undertakes to notify and provide full details to Transnet in the event there is:
  - (i) a change in the Terminal Operator's B-BBEE status which is less than what it was at the time of its appointment including the impact thereof; and
  - (ii) a corporate or internal restructure or change in control of the Terminal Operator which has or likely to impact negatively on the Terminal Operator's B-BBEE status.
- d) Notwithstanding any other reporting requirement in terms hereof, the Supplier Terminal Operator undertakes to provide any B-BBEE data (underlying data relating to the Terminal Operator which has been relied upon or utilised by a verification agency or auditor for the purposes of issuing a verification certificate in respect of the Terminal Operator B-BBEE status) which Transnet may request on written notice within 30 (thirty) calendar days of such request. A failure to provide such data shall constitute a Terminal Operator Default and may be dealt with in accordance with the provisions of clause 26.
- e) In the event there is a change in the Terminal Operator's B-BBEE status, then the provisions of clause 26 shall apply.

## **17 PENALTIES**

### **17.1 Penalties for Non-compliance to Service Level Agreement/Terminal Operator Agreement**

Where the Terminal Operator fails to deliver the Services within the agreed and accepted milestone timelines and provided that the cause of the delay was not due to a fault, act or omission of

Transnet or any force majeure event, penalties shall be imposed at five (5) percent respective Services pursuant to each monthly invoice. All Penalties credited/ paid pursuant to this Agreement, shall be deducted from any damages/ loss claimed.

**17.2 Non-compliance penalties for subcontracting**

- a) Breach of subcontracting obligations provides Transnet cause to terminate the contract in certain cases where there is a material Non-compliance.
- b) If the Terminal Operator fails to achieve its subcontracting commitments as per their bid submission ("a **Non-Compliance**"), the Terminal Operator shall pay a Non-Compliance penalty ("Non-compliance Penalty") to Transnet in respect of such Non-compliance.
- c) Such penalty shall be calculated based on the difference in value between the committed and delivered subcontracting value (i.e., 100% of the undelivered subcontracting value) plus an additional 10% (ten per cent) of such difference.

**17.3 Non-compliance Penalty Certificate:**

- a) If any Non-compliance Penalty arises, the Supplier Development Manager shall issue a Non-compliance Penalty Certificate 90 business days before the expiry of the contract indicating the Non-compliance Penalties which have accrued during that period.
- b) A Non-compliance Penalty Certificate shall be prima facie proof of the matters to which it relates. If the Terminal Operator disputes any of the amounts set out in a Non-compliance Penalty Certificate:
  - the dispute shall be resolved in accordance with the provisions of the Agreement; and
  - if pursuant to that referral, it is determined that the Terminal Operator owes any amount to Transnet pursuant to the Non-compliance Penalty Certificate, then the Terminal Operator shall pay such amount to Transnet within 10 (ten) Business Days of the determination made pursuant to such determination and an accompanying valid Tax Invoice.

**17.4 Payment of Non-compliance Penalties:**

- a) Subject to Clause 17.3 (b) above, the Terminal Operator shall pay the Non-compliance Penalty indicated in the Non-compliance Penalty Certificate within 10 (ten) Business Days of Transnet issuing a valid Tax Invoice to the Terminal Operator for the amount set out in that certificate. If Transnet does not issue a valid Tax Invoice to the Terminal Operator for Non-compliance Penalties accrued during any relevant period, those Non-compliance Penalties shall be carried forward to the next period.
- b) The Terminal Operator shall issue a credit note in respect of the amount due within ten (10) days after the penalty amounts has been determined and/or agreed, failing which , if same has not been remedied by written notice from Transnet within 14 (fourteen) days, Transnet shall, without prejudice to any other rights of Transnet under this Agreement, be entitled to call for payment which may be in any form Transnet deems reasonable and/or appropriate.
- c) Should the Terminal Operator fail to issue any Non-Compliance Penalties within the time indicated above (as applicable), Transnet shall be entitled to deduct (set off) the amount not paid by the Terminal Operator from the account of the Terminal Operator in the ensuing month.
- d) The Non-Compliance Penalties shall be a deducted from the following months invoice.

## **18 INVOICES AND PAYMENT**

- 18.1 Transnet shall pay the Terminal Operator the amounts stipulated in each Purchase Order, subject to the terms and conditions of this Agreement.
- 18.2 Transnet shall pay such amounts to the Terminal Operator upon receipt of a valid and undisputed Tax Invoice together with the supporting documentation, as specified in the Schedule of Requirements appended hereto, once the valid and undisputed Tax Invoices or such portions of the Tax Invoices which are valid and undisputed become due and payable to the Terminal Operator for the delivery of the Services ordered, in terms of clause 18.5 below.
- 18.3 Transnet may, pending an investigation, withhold any payments to the Terminal Operator, in the case where irregular expenditure has been identified in the particular contract and that there is reasonable suspicion that the Terminal Operator is involved or was aware that the contract transgressed any legislation.
- 18.4 All Prices set out in this Agreement and the Schedule of Requirements hereto are to be indicated inclusive and exclusive of VAT, which will be payable at the applicable rate in ZAR.
- 18.5 Unless otherwise provided for in the Schedule of Requirements appended to this Agreement, Tax Invoices shall be submitted together with a month-end statement. Payment against such month-end statement shall be made by Transnet within 30 [thirty] calendar days after date of receipt by Transnet of the Terminal Operator's statement together with the relevant valid and undisputed Tax Invoice(s) and supporting documentation.
- 18.6 Where the payment of any Tax Invoice, or any part of a Tax Invoice which is not in dispute, is not made in accordance with this clause, the Terminal Operator shall be entitled to charge interest on the outstanding amount, at The Standard Bank of South Africa's prime rate of interest in force, for the period from the due date of payment until the outstanding amount is paid.
- 18.7 The Terminal Operator shall remain the owner of all plant, material, machinery, equipment and the like [collectively, **the Supplier's Goods**] provided to Transnet until Transnet has paid in full for the Supplier's Goods, it being specifically agreed that Transnet shall acquire no rights [including liens] of whatsoever nature in such Supplier's Goods until date of final payment by Transnet. Subject to the foregoing, all risk and benefit to the Supplier's Goods shall pass from the Supplier to Transnet on delivery of the Supplier's Goods by the Supplier to Transnet.

## **19 PRICE ADJUSTMENTS**

- 19.1 Prices for Services provided in terms of this Agreement shall be subject to review as indicated in the Schedule of Requirements annexed hereto.
- 19.2 No less than 2 [two] months prior to any proposed Price adjustment, the Parties shall commence negotiations for Prices for the next period or as otherwise indicated in Schedule 1 hereto. The Parties shall have regard for market-related pricing of equivalent goods, continuous improvement initiatives, costs [including labour, raw materials and transport/delivery], order size and frequency and changes to the specification of the Services.
- 19.3 Pursuant to clause 19.2 above, the Terminal Operator shall keep full and accurate records of all costs associated with the supply of the Services to Transnet, in a form to be approved in writing by Transnet. The Terminal Operator shall produce such records to Transnet for inspection at all reasonable times on request and such records may, at Transnet's option, be audited by Transnet or its designated representatives.



- 19.4 Should Transnet and the Terminal Operator fail to reach an agreement on Price for the successive period, either Party shall be entitled to submit this matter to dispute resolution in accordance with clause 33 of the Master Agreement [Dispute Resolution].
- 19.5 If during the period of this Agreement Transnet can purchase similar Services of a like quality from another supplier at a total delivered cost to a Transnet facility that is lower than the total delivered cost of the Services purchased hereunder from the Terminal Operator, Transnet may notify the Terminal Operator of such total delivered cost and the Terminal Operator shall have an opportunity to adjust the Price of the Services purchased hereunder, on such a basis as to result in the same total delivered cost to Transnet, within 30 [thirty] calendar days of such notice. If the Terminal Operator fails to do so or cannot legally do so, Transnet may (i) purchase the Services from such other supplier in which case the obligations, including, but not limited to, any purchase and sale requirements and/or commitments, if any, of Transnet and the Terminal Operator hereunder shall be reduced accordingly; (ii) terminate this Agreement without any penalty, liability or further obligation; or (iii) continue purchases under this Agreement.
- 19.6 If during the period of this Agreement the Terminal Operator sells any materials which are the same as, equivalent to, or substantially similar to the Services herein, at a total delivered cost to a third party lower than the total delivered cost to a Transnet facility, then the Terminal Operator has an opportunity to adjust its Price for the Services purchased hereunder within 30 [thirty] calendar days so that the Price is the same or lower than the total delivered cost of such third party. If the Terminal Operator fails to do so or cannot legally do so, Transnet may (i) purchase the Services from any other such supplier, in which case the obligations, including, but not limited to, any purchase and sale requirements and/or commitments, if any, of Transnet and the Terminal Operator hereunder shall be reduced accordingly; or (ii) terminate this Agreement without any penalty, liability or further obligation. Within 30 [thirty] calendar days of the Commencement Date of this Agreement or at any time Transnet so requests, the Terminal Operator shall certify in writing to Transnet that it is in compliance with this clause and shall provide all information that Transnet reasonably requests in order to verify such compliance.

## **20 WARRANTIES APPLICABLE TO SERVICES**

- 20.1 The Terminal Operator warrants to Transnet that:
- a) it has full capacity and authority to enter into and to perform this Agreement and that this Agreement is executed by a duly authorised representatives of the Terminal Operator;
  - b) it will discharge its obligations under this Agreement and any annexure, appendix or schedule hereto with all due skill, care and diligence;
  - c) it will be solely responsible for the payment of remuneration and associated benefits, if any, of its Personnel and for withholding and remitting income tax for its Personnel in conformance with any applicable laws and regulations;
  - d) the use or possession by Transnet of any Materials will not subject Transnet to any claim for infringement of any Intellectual Property Rights of any third party.
- 20.2 The Terminal Operator warrants that it will perform its obligations under this Agreement in accordance with the Master of agreement and Terminal Operators agreement as defined in the relevant schedule. Transnet may at its discretion audit compliance with the Service Levels/Terminal Operator Agreement , provided that any such audit is carried out with reasonable prior notice and in

a reasonable way so as not to have an adverse effect on the performance of the Services. Without prejudice to clause 20.3 below, in the event that the Terminal Operator fails to meet the Service Levels, Transnet may claim appropriate service credits or invoke a retention of Fees as detailed in the relevant schedule.

- 20.3 The Terminal Operator warrants that for a period of 90 [ninety] calendar days from Acceptance of the Deliverables they will, if properly used, conform in all material respects with the requirements set out in the relevant schedule. The Terminal Operator will at its expense remedy any such non-conformance as soon as possible but in any event within 30 [thirty] calendar days of notification by Transnet. In the event that the Terminal Operator fails or is unable to remedy such non-conformance within such time-scale, Transnet will be entitled to employ a third party to do so in place of the Terminal Operator and any excess charges or costs incurred by Transnet as a result shall be paid by the Terminal Operator.
- 20.4 The Terminal Operator will remedy any defect within 30 [thirty] calendar days of being notified of that defect by Transnet in writing.
- 20.5 The Terminal Operator will not be liable to remedy any problem arising from or caused by any modification made by Transnet to the Deliverables, or any part thereof, without the prior approval of the Terminal Operator.
- 20.6 The Terminal Operator shall advise Transnet of the effects of any steps proposed by Transnet pursuant to clause 20.5 above, including but not limited to any cost implications or any disruption or delay in the performance of the Services. The Parties agree that any changes to the Services, including the charges for the Services or any timetables for delivery of the Services, will be agreed in accordance with the change control procedure, as set out in clause 38 [*Amendment and Change Control*].
- 20.7 The Terminal Operator undertakes to comply with South Africa's general privacy protection in terms of Section 14 of the Bill of Rights in connection with this Agreement and shall procure that its Personnel shall observe the provisions of Section 14 [as applicable] or any amendments and re-enactments thereof and any regulations made pursuant thereto.
- 20.8 The Terminal Operator warrants that it has taken all reasonable precautions to ensure that, in the event of a disaster, the impact of such disaster on the ability of the Terminal Operator to comply with its obligations under this Agreement will be reduced to the greatest extent possible, and that the Terminal Operator shall ensure that it has appropriate, tested and documented recovery arrangements in place.

## **21 THIRD PARTY INDEMNITY**

- 21.1 The Terminal Operator hereby indemnifies and shall hold Transnet harmless against any direct damages suffered by or claims arising against Transnet in respect of any breach by the Terminal Operator of clause 18 above, which has not been remedied, save that the Terminal Operator shall not be liable to the extent that any liability arises as a result of any actions or omissions of Transnet.

## **22 INSPECTION APPLICABLE TO SERVICES**

- 22.1 Transnet reserves the right to arrange for the inspection of all Services forming the subject of any Purchase Order, at any stage before final acceptance and by any means it may think fit, and when such inspection is to be carried out, the relevant Purchase Order(s) shall be endorsed accordingly.
- 22.2 When inspection at the Terminal Operator's works or warehouse is specified, Transnet's authorised inspector shall have supervised access to only that portion of the premises of the Terminal Operator directly applicable to the Services at all times during working hours on a Business Day, and at a mutually agreeable time and date; shall have liberty to inspect work which is the subject of the Purchase Order, once per annum at a mutually agreeable time and date, or more frequently to the extent that Transnet reasonably believes that the Terminal Operator has breached this Agreement at any stage of rendering, and may reject any Services which are found to be incomplete, defective or in any way not in conformity with the terms and specifications of this Agreement; and the Terminal Operator shall afford all reasonable facilities for such access and inspection.
- 22.3 Inspection will be arranged by the Staff of Transnet, as indicated in the Purchase Order(s).
- 22.4 When Services are ready for inspection, the Terminal Operator shall apply promptly to the appropriate authority for instructions regarding such inspection. All applications for inspection shall quote Transnet's Agreement or Purchase Order number. Seven (7) Business Days' notice of readiness from the Terminal Operator shall be given to the authorised inspector appointed by Transnet to carry out such inspection.
- 22.5 All inspections shall abide by the Terminal Operator's security protocols and shall not unreasonably interfere with the normal business operations of the Terminal Operator.

## **23 TOTAL OR PARTIAL FAILURE TO PERFORM**

- 23.1 In the case of Services to be specially rendered for it, if Transnet at any time ascertains that:
- a) no rendering of the Services specified in a Purchase Order has commenced and there is little or no prospect, in Transnet's opinion, that provisioning will commence within a reasonable time; or
  - b) provision of any of the Services is being or is likely to be delayed beyond the promised provision date(s), and there is little or no prospect of the Purchase Order(s) being carried out within reasonable adherence to the promised provision rate(s) or time(s),
- then Transnet may, irrespective of the cause of the delay, by notice to the Terminal Operator, cancel as from a future date specified in such notice the whole or any part of this Agreement or Purchase Order in respect of which the Services to be provided have not been completed by that date, without incurring any liability by reason of such cancellation except as provided in this clause.
- 23.2 The Terminal Operator shall thereupon, as soon as possible after such date, provide to Transnet the Services (if any) already completed, and payment for the part performance shall be made on a pro rata basis, provided the uncompleted part is not an integral or essential part of the completed Services. Where an integral or essential part of the work has not been completed, the amount to be paid to the Terminal Operator will be calculated on the basis of Transnet's enrichment. The Terminal Operator shall, wherever practicable, provide Transnet with the necessary drawings and/or specifications to enable it to complete the work.
- 23.3 Whenever, in any case not covered by clause 23.1 above, the Terminal Operator fails or neglects to execute the work or to provide any portion of the Services as required by the terms of this

Agreement or Purchase Order and such failure to perform is not as a result of any of the provisions of clause 6, or the Terminal Operator has not remedied the breach, within thirty (30) calendar days of written demand from Transnet, Transnet may cancel this Agreement or Purchase Order in so far as it relates to the unexecuted work or the undelivered or rejected portion of the Services, and in such event, the provision of the remaining portion shall remain subject in all respects to these conditions.

## **24 NON-CONFORMANCE OF SERVICES PROCURED**

- 24.1 In the case of services provided for and procured by Transnet from the Terminal Operator in terms of this Agreement, being found not to conform to the Transnet standards, specifications and requirements, Transnet at any time may be entitled to raise a Non Conformance Report (NCR) against a Terminal Operator whose Services do not conform to Transnet standards, specifications and requirements directing the Terminal Operator to investigate and remedy the non-conformance within the stipulated time frame as may be determined by Transnet at its discretion.
- 24.2 Failure by the Terminal Operator to fully comply with NCR within the period stated in sub-clause 24.1 above, shall entitle Transnet to further conditions to which the Terminal Operator must discharge in order to close the NCR or to terminate the order without giving the Terminal Operator written notice of termination in terms of this Agreement.

## **25 RIGHTS ON CANCELLATION**

- 25.1 If this Agreement or Purchase Order is cancelled in whole or in part in terms of clause 23 22 [*Total or Partial Failure to Perform*], Transnet may execute or complete this Agreement with any other entity and do so on such terms as it may deem proper, or may procure other comparable Services in substitution for those neglected to be manufactured or supplied or rejected as aforesaid, and may recover from the Supplier the difference between the cost of such Services and the Price [if the latter was lower] as well as any costs and expenses [including any additional transport costs] which Transnet may have had to incur in consequence of the Terminal Operator's default.
- 25.2 Any amount which may be recoverable from the Terminal Operator in terms of clause 25.1 above, without prejudice to any other legal remedies available to Transnet, may be deducted in whole or in part from any monies in the hands of Transnet and due for payment to the Terminal Operator.

## **26 BREACH AND TERMINATION**

- 26.1 Termination in accordance with clause 6 [Term and Cancellation] shall not prejudice or affect any right of action or remedy which shall have accrued or shall thereafter accrue to either Party and all provisions which are to survive this Agreement or impliedly do so shall remain in force and in effect.
- 26.2 On termination of this Agreement or a Work Order, the Terminal Operator will immediately deliver up, and procure that its Personnel will immediately deliver up to Transnet, all Deliverables and property belonging to Transnet [or, in the event of termination of a Work Order, such as is relevant to that Work Order] which may be in the possession of, or under the control of the Terminal Operator, and certify to Transnet in writing that this has been done.
- 26.3 To the extent that any of the Deliverables and property referred to in clause 26.2 above are in electronic form and contained on non-detachable storage devices, the Terminal Operator will provide Transnet with unencrypted copies of the same on magnetic media and will irretrievably destroy and delete copies so held.

- 26.4 In the event that this Agreement is terminated by the Terminal Operator under clause 6 (Term and Cancellation), or in the event that a Work Order is terminated by Transnet under clause 26 (Breach and Termination), Transnet will pay to the Terminal Operator all outstanding Fees (apportioned on a pro rata basis) relating to the work undertaken by the Terminal Operator up until the date of such termination. Transnet will also pay the costs of any Services and materials ordered by the Terminal Operator in relation to such work for which the Terminal Operator has paid or is legally obliged to pay, in which case, on provision of such services or materials, the Terminal Operator will promptly provide such Services and materials to Transnet or as it may direct.
- 26.5 If either Party [**the Defaulting Party**] commits a material breach of this Agreement and fails to remedy such breach within 30 [thirty] calendar days of written notice thereof, the other Party [hereinafter **the Aggrieved Party**], shall be entitled, in addition to any other rights and remedies that it may have in terms of this Agreement, to terminate this Agreement forthwith without any liability and without prejudice to any claims which the Aggrieved Party may have for damages against the Defaulting Party.
- 26.6 Either Party may terminate this Agreement forthwith by notice in writing to the other Party when the other Party is unable to pay its debts as they fall due or commits any act or omission which would be an act of insolvency in terms of the Insolvency Act, 24 of 1936 [as amended from time to time], or if any action, application or proceeding is made with regard to it for:
- a) a voluntary arrangement or composition or reconstruction of its debts;
  - b) its winding-up or dissolution;
  - c) the appointment of a liquidator, trustee, receiver, administrative receiver or similar officer;
  - d) any similar action, application or proceeding in any jurisdiction to which it is subject.
- 26.7 Transnet may terminate this Agreement at any time within 2 [two] months of becoming aware of a change of control of the Terminal Operator by notice in writing to the Terminal Operator. For the purposes of this clause, **control** means the right to direct the affairs of a company whether by ownership of shares, membership of the board of directors, agreement or otherwise.
- 26.8 Notwithstanding this clause 24, Transnet may cancel this Agreement without cause by giving 90 [ninety] calendar days prior written notice thereof to the Terminal Operator, or
- 26.9 The provisions of clauses 2 [Definitions], 18 [Warranties], 25 [Rights on Cancellation], 27 [Confidentiality], 31 [Limitation of Liability], 31 [Intellectual Property Rights], 35 [Dispute Resolution] and 39 [Governing Law] shall survive termination or expiry of this Agreement.

## **27 CESSIONS AND ASSIGNMENTS AS PER NT INSTRUCTION NOTE 08 OF 2022/2023**

- 27.1 The Terminal Operator is not allowed to cede its rights for payment in terms of this Agreement without prior written approval from Transnet. Cession shall only be applicable as follows:
- a) Cession must only be applicable to the transfer of right to payment for services rendered by a Terminal Operator to an FSP or State Institutions;
  - b) The written request for cession must be by the Terminal Operator and not a third party; and
  - c) The written request by the Terminal Operator must be accompanied by the cession agreement.
- 27.2 The Terminal Operator is prohibited from transferring its rights and obligations to perform under this contract. Assignments are against the principles of section 217 of the Constitution mainly, fairness, transparency and competitiveness.

## **28 FORCE MAJEURE**

- 28.1 Neither Party shall have any claim against the other Party arising from any failure or delay in the performance of any obligation of either Party under this Agreement caused by an act of force majeure such as acts of God, fire, flood, war, lockout, government action, laws or regulations, terrorism or civil disturbance, defaults or other circumstances or factors beyond the reasonable control of either Party, and to the extent that the performance of obligations of either Party hereunder is delayed by virtue of the foregoing, any period stipulated for any such performance shall be reasonably extended. Transnet may however rely on strikes, industrial dispute and riots as a ground of force majeure.
- 28.2 Each Party will take all reasonable steps by whatever lawful means that are available to resume full performance as soon as practicable and will seek agreement to modification of the relevant provisions of this Agreement in order to accommodate the new circumstances caused by the act of *force majeure*. If a Party fails to agree with such modifications proposed by the other Party within 90 [ninety] calendar days of the act of *force majeure* first occurring, either Party may thereafter terminate this Agreement with immediate notice.

## **29 PROTECTION OF PERSONAL INFORMATION**

- a) The following terms shall bear the same meaning as contemplated in Section 1 of the Protection of Personal Information Act 4 of 2013 ("POPIA"):
- consent; person; personal information; processing; record; Regulator as well as any terms derived from these terms of the POPIA.
- b) Transnet will process all information by the Respondent in terms of the requirements contemplated in Section 4(1) of the POPIA:
- Accountability; Processing limitation; Purpose specification; Further processing limitation; Information quality; Openness; Security safeguards and Data subject participation.
- c) Transnet agrees that in submitting any information or documentation requested in the RFP and in this Agreement, the Terminal Operator consents to the processing of their personal information for the purpose of, but not limited to, risk assessment, contract award, contract management, auditing, legal opinions/litigation, investigations (if applicable), document storage for the legislatively required period, destruction, de-identification and publishing of personal information by Transnet and/or its authorised appointed third parties.
- d) The Parties agree that they may obtain and have access to personal information for the fulfilment of the rights and obligations contained herein. In performing the obligations as set out in this Agreement, the Parties shall at all times ensure that:
- i. they process personal information only for the express purpose for which it was obtained;
  - ii. once processed for the purposes for which it was obtained, all personal information will be destroyed to an extent that it cannot be reconstructed to its original form, subject to any legal retention requirements;
  - iii. Personal information is provided only to authorised personnel who strictly require the personal information to carry out the Parties' respective obligations under this Agreement;
  - iv. they do not disclose personal information of the other Party, other than in terms of this Agreement;

- v. they have all reasonable technical and organisational measures in place to protect all personal information from unauthorised access and/or use;
  - vi. they have appropriate technical and organisational measures in place to safeguard the security, integrity and authenticity of all information in their possession or under their control in terms of this Agreement;
  - vii. they identify all reasonably foreseeable internal and external risks to personal information in their possession or under their control; establish and maintain appropriate safeguards against the risks identified; regularly verify that the safeguards are effectively implemented; and ensure that the safeguards are continually updated in response to new risks or deficiencies in previously implemented safeguards;
  - viii. such personal information is protected against unauthorised or unlawful processing, accidental loss, destruction or damage, alteration, disclosure or access.
- 29.1 The Parties agree that if personal information will be processed for additional purposes beyond the original purpose for which it was obtained, explicit consent must be obtained beforehand from those persons whose information will be subject to such processing.
- 29.2 Should it be necessary for either Party to disclose or otherwise make available the personal information to any third party (including sub-contractors and employees) that is not already consented to, it may do so only with the prior written consent of the other Party. The Party requiring such consent shall require of all such third parties, appropriate written undertakings to be provided, containing similar terms to that set forth in this clause, and dealing with that third party's obligations in respect of its processing of the personal information. Following approval by the other Party, the Party requiring consent agrees that the provisions of this clause shall *mutatis mutandis* apply to all authorised third parties who process personal information.
- 29.3 The Parties shall ensure that any persons authorized to process information on their behalf (including employees and third parties) will safeguard the security, integrity and authenticity of all information. Where necessary to meet this requirement, the Parties shall keep all personal information and any analyses, profiles, or documents derived therefrom logically separated from all other information and documentation held by it.
- 29.4 The Parties shall carry out regular assessments to identify all reasonably foreseeable internal and external risks to the personal information in its possession or under its control. The Parties shall implement and maintain appropriate safeguards against the risks which it identifies and shall also regularly verify that the safeguards which it has in place have been effectively implemented.
- 29.5 The Parties agree that they will promptly return, destroy or de-identify any personal information in their possession or control which belongs to the other Party once it no longer serves the purpose for which it was collected in relation to this Agreement, subject to any legal retention requirements. This may be at the request of the other Party and includes circumstances where a person has requested the Parties to delete all instances of their personal information. The information will be destroyed or de-identified in such a manner that it cannot be reconstructed to its original form, linking it to any particular individual or organisation.
- 29.6 Personal Information security breach:
- a) Each Party shall notify the other party in writing as soon as possible after it becomes aware of or suspects any loss, unauthorised access or unlawful use of any personal information and shall,

at its own cost, take all necessary remedial steps to mitigate the extent of the loss or compromise of personal information and to restore the integrity of the affected personal information as quickly as is possible. The Parties shall also be required to provide each other with details of the persons affected by the compromise and the nature and extent of the compromise, including details of the identity of the unauthorised person who may have accessed or acquired the personal information.

- b) The Parties shall provide on-going updates on the progress in resolving the compromise at reasonable intervals until such time as the compromise is resolved.
- c) Where required, the Parties must notify the South African Police Service; and/or the State Security Agency and the Information Regulator and the affected persons of the security breach. Any such notification shall always include sufficient information to allow the persons to take protective measures against the potential consequences of the compromise.
- d) The Parties undertake to co-operate in any investigations relating to security which is carried out by or on behalf of the other including providing any information or material in its possession or control and implementing new security measures.

### **30 CONFIDENTIALITY**

30.1 The Parties hereby undertake the following with regard to Confidential Information:

- a) not to divulge or disclose to any person whomsoever in any form or manner whatsoever, either directly or indirectly, any Confidential Information of the other without the prior written consent of such other Party, other than when called upon to do so in accordance with a statute, or by a court having jurisdiction, or by any other duly authorised and empowered authority or official, in which event the Party concerned shall do what is reasonably possible to inform the other of such a demand and each shall assist the other in seeking appropriate relief or the instituting of a defensive action to protect the Confidential Information concerned;
- b) not to use, exploit, permit the use of, directly or indirectly, or in any other manner whatsoever apply the Confidential Information disclosed to it as a result of this Agreement, for any purpose whatsoever other than for the purpose for which it is disclosed or otherwise than in strict compliance with the provisions in this Agreement;
- c) not to make any notes, sketches, drawings, photographs or copies of any kind of any part of the disclosed Confidential Information without the prior written consent of such other Party, except when reasonably necessary for the purpose of this Agreement, in which case such copies shall be regarded as Confidential Information;
- d) not to de-compile, disassemble or reverse engineer any composition, compilation, concept application, item, component de-compilation, including software or hardware disclosed and shall not analyse any sample provided by Transnet, or otherwise determine the composition or structure or cause to permit these tasks to be carried out except in the performance of its obligations pursuant to this Agreement;
- e) not to exercise less care to safeguard Transnet Confidential Information than the Party exercises in safeguarding its own competitive, sensitive or Confidential Information;
- f) Confidential Information disclosed by either Party to the other or by either Party to any other party used by such party in the performance of this Agreement, shall be dealt with as



“restricted” or shall be dealt with according to any other appropriate level of confidentiality relevant to the nature of the information concerned, agreed between the Parties concerned and stipulated in writing for such information in such cases;

- g) the Parties shall not make or permit to be made by any other person subject to their control, any public statements or issue press releases or disclose Confidential Information with regard to any matter related to this Agreement, unless written authorisation to do so has first been obtained from the Party first disclosing such information;
- h) each Party shall be entitled to disclose such aspects of Confidential Information as may be relevant to one or more technically qualified employees or consultants of the Party who are required in the course of their duties to receive the Confidential Information for the Permitted Purpose provided that the employee or consultant concerned has a legitimate interest therein, and then only to the extent necessary for the Permitted Purpose, and is informed by the Party of the confidential nature of the Confidential Information and the obligations of the confidentiality to which such disclosure is subject and the Party shall ensure such employees or consultants honour such obligations;
- i) each Party shall notify the other Party of the name of each person or entity to whom any Confidential Information has been disclosed as soon as practicable after such disclosure;
- j) each Party shall ensure that any person or entity to which it discloses Confidential Information shall observe and perform all of the covenants the Party has accepted in this Agreement as if such person or entity has signed this Agreement. The Party disclosing the Confidential Information shall be responsible for any breach of the provisions of this Agreement by such person or entity.

30.2 The duties and obligations with regard to Confidential Information in this clause 30 shall not apply where:

- a) a Party can demonstrate that such information is already in the public domain or becomes available to the public through no breach of this Agreement by that Party, or its Staff; or
- b) was rightfully in a Party’s possession prior to receipt from the other Party, as proven by the first-mentioned Party’s written records, without an infringement of an obligation or duty of confidentiality; or
- c) can be proved to have been rightfully received by a Party from a third party without a breach of a duty or obligation of confidentiality; or
- d) is independently developed by a Party as proven by its written records.

30.3 This clause 30 shall survive termination for any reason of this Agreement and shall remain in force and effect from the Commencement Date of this Agreement and 5 [five] years after the termination of this Agreement. Upon termination of this Agreement, all documentation furnished to the Terminal Operator by Transnet pursuant to this Agreement shall be returned to Transnet including, without limitation, all corporate identity equipment including dyes, blocks, labels, advertising matter, printing matter and the like.

### **31 LIMITATION OF LIABILITY**

31.1 The Terminal Operator’s liability under this clause 31 shall be in addition to any warranty or condition of any kind, express or implied by law or otherwise, relating to the Services or ancillary

Services, including the quality of the Services or ancillary Services or any materials delivered pursuant to this Agreement.

31.2 Neither Party excludes or limits liability to the other Party for:

- a) death or personal injury caused by its negligence, [including its employees', agents' or Subcontractors' negligence]; or
- b) fraud or theft.

31.3 The Terminal Operator shall indemnify and keep Transnet indemnified from and against liability for damage to any Transnet property [whether tangible or intangible] or any other loss, costs or damage suffered by Transnet to the extent that it results from any act of or omission by the Terminal Operator or its Personnel in connection with this Agreement. The Terminal Operator's liability arising out of this clause 31.3 shall be limited to direct damages.

31.4 Subject always to clauses 31.1 and 31.2 above, the liability of either the Terminal Operator or Transnet under or in connection with this Agreement, whether for negligence, misrepresentation, breach of contract or otherwise, for direct loss or damage arising out of each Default or series of related Defaults shall not exceed 100% [one hundred per cent] of the Fees paid under the schedule or Work Order to which the Default(s) relates.

31.5 Subject to clauses 31.1 to 31.4 above, in no event shall either Party be liable to the other for indirect or consequential loss or damage or including indirect or consequential loss of profits, business, revenue, goodwill or anticipated savings of an indirect nature or loss or damage incurred by the other Party as a result of third party claims.

31.6 If for any reason the exclusion of liability in clause 31.5 above is void or unenforceable, either Party's total liability for all loss or damage under this Agreement shall be as provided in clause 31.3 above.

31.7 Nothing in this clause 31 shall be taken as limiting the liability of the Parties in respect of clauses 30 [Confidentiality] and 32 [Intellectual Property Rights].

## **32 INTELLECTUAL PROPERTY RIGHTS**

32.1 On the termination or cancellation of this Terminal Operator Agreement in accordance with its terms or within seven (7) days prior to the Expiry Date, the Terminal Operator shall procure that any Transferable Intellectual Property shall be provided to any successor terminal operator, which shall, to the extent possible, be granted a perpetual non-exclusive, royalty-free licence to use such Transferable Licensed Intellectual Property for the operation of the Terminal, and not for any other purpose or at any other place. The Terminal Operator is under no obligation to provide Nontransferable Intellectual Property to a successor Terminal Operator Intellectual Property to a successor Terminal Operator.

32.2 Intellectual Property Rights whatsoever, whether capable of registration or not, regarding the Authority's name, trademarks, logos, image and all other intellectual property matters relating to the Authority, including its name, trademarks, logos or image shall remain the sole property of the Authority.

32.3 The Authority may, on prior written application by the Terminal Operator, grant a non-exclusive revocable right and licence to the Terminal Operator to use the Authority's trademarks and logos, on terms to be agreed between the Parties.

**33 NON-WAIVER**

- 33.1 Failure or neglect by either Party, at any time, to enforce any of the provisions of this Agreement, shall not in any manner be construed to be a waiver of any of that Party's rights in that regard and in terms of this Agreement.
- 33.2 Such failure or neglect shall not in any manner affect the continued, unaltered validity of this Agreement, or prejudice the right of that Party to institute subsequent action.

**34 PARTIAL INVALIDITY**

- 34.1 If any provision of this Agreement shall be held to be invalid, illegal or unenforceable, or shall be required to be modified, the validity, legality and enforceability of the remaining provisions shall not be affected thereby.

**35 DISPUTE RESOLUTION**

- 35.1 Should any dispute of whatsoever nature arise between the Parties concerning this Agreement, the Parties shall try to resolve the dispute by negotiation within 10 [ten] Business Days of such dispute arising.
- 35.2 If the dispute has not been resolved by such negotiation, either of the Parties may refer the dispute to AFSA and notify the other Party accordingly, which proceedings shall be held in Gqeberha (Port Elizabeth)
- 35.3 Such dispute shall be finally resolved in accordance with the rules of AFSA by an arbitrator or arbitrators appointed by AFSA.
- 35.4 This clause constitutes an irrevocable consent by the Parties to any proceedings in terms hereof, and neither of the Parties shall be entitled to withdraw from the provisions of this clause or claim at any such proceedings that it is not bound by this clause 35.
- 35.5 This clause 35 is severable from the rest of this Agreement and shall remain in effect even if this Agreement is terminated for any reason.
- 35.6 This clause 35 shall not preclude either Party from seeking urgent relief in a court of appropriate jurisdiction, where grounds for urgency exist.

**36 ADDRESSES FOR NOTICES**

- 36.1 The Parties to this Agreement select the physical addresses and fax numbers, as detailed hereafter, as their respective addresses for giving or sending any notice provided for or required in terms of this Agreement, provided that either Party shall be entitled to substitute such other address or fax number, as may be, by written notice to the other:

a) **Transnet**

- (i) For legal notices:
  - eMendi Building
  - N2 Neptune Road, Off Klub Road
  - Port of Ngqura
  - Port Elizabeth
  - 6100
  - Fax No. N/A

ESTABLISHMENT OF AN APPROVED PANEL OF SERVICE PROVIDERS TO BE APPOINTED AS OPERATOR(S) OF LAST RESORT OF TNPA PORT TERMINAL/FACILITY OPERATIONS, FOR A PERIOD OF THREE (3) YEARS FOR AS AND WHEN REQUIRED, AS A TRANSITIONAL MECHANISM UNTIL NEW TERMINAL OPERATOR(S) ARE APPOINTED THROUGH THE SECTION 56 PROCESS.

(ii) For commercial notices:

Attention: TNPA Legal Department  
 eMendi Building  
 N2 Neptune Road, Off Klub Road  
 Port of Ngqura  
 Port Elizabeth  
 6100

Fax No. N/A  
 Attention: TNPA Supply Chain Management  
 Department

**b) The Terminal Operator**

(i) For legal notices: .....

.....

.....

Fax No. ....

Attention: .....

(ii) For commercial notices: .....

.....

.....

Fax No. ....

Attention: .....

36.2 Any notice shall be addressed to a Party at its physical address, or delivered by hand, or sent by fax or email.

36.3 Any notice shall be deemed to have been given:

- a) if hand delivered, on the day of delivery;
- b) if faxed, on the date and time of sending of such fax, as evidenced by a fax confirmation printout, provided that such notice shall be confirmed by prepaid registered post on the date of dispatch of such fax, or, should no postal facilities be available on that date, on the next Business Day; or
- c) if sent by email, on the date and time received, provided that such notice shall be confirmed by prepaid registered post on the date of dispatch of such email, or, should no postal facilities be available on that date, on the next Business Day.

**37 WHOLE AND ONLY AGREEMENT**

37.1 The Parties hereby confirm that this Agreement constitutes the whole and only agreement between them with regard to the subject matter of this Agreement.

37.2 The Parties hereby confirm that this Agreement replaces all other agreements which exist or may have existed in any form whatsoever between them, with regard to the subject matter dealt with in this Agreement, any annexures appended hereto and the Schedule of Requirements.

### **38 AMENDMENT AND CHANGE CONTROL**

- 38.1 Any amendment or change of any nature made to this Agreement and the Schedule of Requirements thereof shall only be valid if it is in writing, signed by both Parties and added to this Agreement as an addendum hereto. In this regard a Change Notice must first be defined and issued by the requesting Party. A Change Notice Response must then be issued by responding Party. A formal approval of the Change Request will then trigger the issue of the addendum to this Agreement.
- 38.2 In the event the Parties cannot agree upon changes, the Parties shall in good faith seek to agree any proposed changes using the dispute resolution procedures in clause 355 [*Dispute Resolution*].

### **39 GENERAL**

#### **39.1 Governing Law**

This Agreement is exclusively governed by and construed in accordance with the laws of the Republic of South Africa and is subject to the jurisdiction of the courts of the Republic of South Africa.

#### **39.2 Change of Law**

In this Agreement, unless the context otherwise requires, references to a statutory provision include references to that statutory provision as from time to time amended, extended or re-enacted and any regulations made under it, provided that in the event that the amendment, extension or re-enactment of any statutory provision or introduction of any new statutory provision has a material impact on the obligations of either Party, the Parties will negotiate in good faith to agree such amendments to this Agreement as may be appropriate in the circumstances. If, within a reasonable period of time, the Terminal Operator and Transnet cannot reach agreement on the nature of the changes required or on modification of Prices, delivery schedules, warranties, or other terms and conditions, either Party may seek to have the matter determined in accordance with clause 355 [*Dispute Resolution*] above.

#### **39.3 Counterparts**

This Agreement may be signed in any number of counterparts, all of which taken together shall constitute one and the same instrument. Either Party may enter into this Agreement by signing any such counterpart.

### **40 DATABASE OF RESTRICTED SUPPLIER**

The process of restriction is used to exclude a company/person from conducting future business with Transnet and other organs of state for a specified period. No Bid shall be awarded to a Bidder whose name (or any of its members, directors, partners or trustees) appear on the Register of Tender Defaulters kept by National Treasury, or who have been placed on National Treasury's List of Restricted Terminal Operators. Transnet reserves the right to withdraw an award, or cancel a contract concluded with a Bidder should it be established, at any time, that a bidder has been restricted with National Treasury by another government institution.

ESTABLISHMENT OF AN APPROVED PANEL OF SERVICE PROVIDERS TO BE APPOINTED AS OPERATOR(S) OF LAST RESORT OF TNPA PORT TERMINAL/FACILITY OPERATIONS, FOR A PERIOD OF THREE (3) YEARS FOR AS AND WHEN REQUIRED, AS A TRANSITIONAL MECHANISM UNTIL NEW TERMINAL OPERATOR(S) ARE APPOINTED THROUGH THE SECTION 56 PROCESS.

**Thus signed by the Parties and witnessed on the following dates and at the following places:**

For and on behalf of TRANSNET SOC LTD duly authorised hereto	For and on behalf of <b>TRANSNET SOC LTD</b> duly authorised hereto	For and on behalf of  duly authorised hereto
Name:	Name:	Name:
Position:	Position:	Position:
Signature:	Signature:	Signature:
Date:	Date:	Date:
Place:	Place:	Place:

<b>AS WITNESS:</b> Name:	<b>AS WITNESS:</b> Name:	<b>AS WITNESS:</b> Name:
Signature:	Signature:	Signature: